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Nos. 90-913 and 90-914

In the Supreme Court of the United States

OCTOBER TERM, 1991

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, PETITIONER

v.

MCORP FINANCIAL INC., ET AL.

MCORP, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM IN RESPONSE TO THE SUPPLEMENTAL JOINT BRIEF OF MCORP, ET AL.

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10

TABLE OF AUTHORITIES

Case:	Page
Wisconsin Public Intervenor v. *Mortier*, 111 S. Ct. 2476 (1991)	5
Statutes and regulations:	
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	2
Financial Institutions Supervisory Act, 12 U.S.C. 1818 *et seq.*:	
12 U.S.C. 1818(b)	2, 3, 4, 7
12 U.S.C. 1818(c)(2)	7-8
12 U.S.C. 1818(h)	7
12 U.S.C. 1818(i)	7
International Lending Supervision Act of 1983, 12 U.S.C. 3901 *et seq.*:	
12 U.S.C. 3902(2)	3
12 U.S.C. 3907	3
12 U.S.C. 3907(a)	3
12 U.S.C. 3907 (b)(1)	4
12 U.S.C. 3907 (b)(2)(A)	2, 3, 4
12 U.S.C. 3909(a)	3-4
12 C.F.R. 263.35-.40	3
12 C.F.R. 263.80-.85	3
Miscellaneous:	
56 Fed. Reg. 38,065-38,066 (1991)	3

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MCorp has filed a "supplemental" brief on the eve of oral argument to advise the Court of what it characterizes as "intervening developments," "matter that was not available in time to be included in the Joint Brief of MCorp," and a "material misstatement

of fact contained in" the government's reply brief. MCorp Supp. Br. 1. MCorp's filing—in reality, a sur-reply brief—takes this Court on yet another circuitous journey through irrelevant materials that serves no purpose except to obfuscate the issues.

1. *The "intervening development."* MCorp cites, as its intervening development, the government's filing of a brief in opposition, on behalf of the Federal Deposit Insurance Corporation, in *Bank of Coushatta* v. *FDIC*, No. 91-24 (filed August 16, 1991). See MCorp Supp. Br. 1-2. MCorp contends that a statement in a footnote in that brief in opposition is inconsistent with the government's position here. Not so.

The principal issue in *Bank of Coushatta* is whether an FDIC capital directive issued to a FDIC-insured bank is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In the course of that brief, we explained that the FDIC may issue a capital directive under the ILSA, 12 U.S.C. 3907(b)(2)(A), as an alternative to a cease-and-desist order under the FISA, 12 U.S.C. 1818(b), to compel an FDIC-insured bank to increase its capital.[1] See 91-24 Br. in Opp. 2 n.1.

The Bank of Coushatta argued that if a banking agency could issue an ILSA capital directive without subsequent APA review, that "would moot the source-of-strength issue in *MCorp* by providing a much more expeditious and reliable remedy to the banking agencies." 91-24 Pet. 15. We responded that

[1] Section 3907(b)(2)(A) provides:

> In addition to, or in lieu of, any other action authorized by law, * * * the appropriate Federal banking agency may issue a directive to a banking institution that fails to maintain capital at or above its required level as established pursuant to subsection (a) of this section.

12 U.S.C. 3907(b)(2)(A).

the availability of a capital directive under 12 U.S.C. 3907 did not "moot" the issue in this case because "a capital directive cannot impose requirements on a bank holding company such as were imposed in *MCorp*." 91-24 Br. in Opp. 12 n.8.

Our point was that Section 3907(b)(2)(A) does not authorize the Board to issue a *capital directive* to a bank holding company to increase a *subsidiary* bank's capital, because the bank holding company is not a "banking institution" that has "fail[ed] to maintain capital at or above its required level." 12 U.S.C. 3907(b)(2)(A). The Board, however, may require a bank holding company to provide capital to subsidiary banks *under the FISA*, if it can show that the bank holding company's failure to act as a source of strength is an "unsafe or unsound practice." 12 U.S.C. 1818(b).[2]

[2] MCorp misconstrues our brief in opposition in *Bank of Coushatta* as indicating that a capital directive "cannot be issued against a bank holding company." MCorp Supp. Br. 2. The Board *can* issue capital directives to a bank holding company requiring the bank holding company to increase its *own* capital. The Board has long had in place and has recently revised regulations providing for such capital directives. See 12 C.F.R. 263.35-.40 (1991); 56 Fed. Reg. 38,065-38,066 (1991) (to be codified at 12 C.F.R. 263.80-.85).

The Board has promulgated those regulations on the basis that while a bank holding company is not a "banking institution" within the meaning of Section 3907(a) of the ISLA, see 12 U.S.C. 3902(2), it is "an affiliate" of its subsidiary banks. The Board therefore has the power to issue capital directives to a bank holding company to increase its *own* capital under the authority of Section 3909(a)(2), which provides in relevant part:

> The appropriate Federal banking agency is authorized to apply the provisions of this chapter to any affiliate of an insured bank, but only to affiliates for which it is the appropriate Federal banking agency, in order to promote uni-

Contrary to MCorp's contention, our submissions in this case and in Bank of Coushatta are consistent and, indeed, reflect a careful reading of the relevant statutes. As we explained in our opening brief in this case, the ILSA recognizes that the failure to maintain adequate capital levels is an "unsafe or unsound" practice under the FISA. 12 U.S.C. 3907(b)(1). See U.S. Br. 38-39. As we explained in our brief in opposition in *Bank of Coushatta*, the ILSA does not authorize the issuance of a capital directive to a bank holding company to cure a subsidiary bank's capital deficiency. 12 U.S.C. 3907(b)(2)(A). See 91-24 Br. in Opp. 12 n.8. As we explained in *both* briefs, the Board may, however, bring a cease-and-desist proceeding under the FISA on the ground that the bank holding company's failure to provide capital to a subsidiary bank is an "unsafe or unsound" practice. 12 U.S.C. 1818(b). U.S. Br. 37-42; 91-24 Br. in Opp. 12 n.8. MCorp has attempted to manufacture an "intervening development" by simply quoting a statement in our brief in *Bank of Coushatta* out of context.

2. The *"matter that was not available in time to be included in the Joint Brief of MCorp."* MCorp next offers as new authority congressional testimony from the Securities and Exchange Commission and FDIC officials concerning pending banking legislation. MCorp Supp. Br. 2-7. MCorp asserts that the SEC/FDIC testimony is critical of the "policy and economic wisdom" of imposing source-of-strength obligations in future legislation and that those criticisms "preclude any basis" for deference to the Board's interpretation of existing legislation. *Id.* at 4.

form application of this chapter or to prevent evasions thereof.

12 U.S.C. 3909(a)(2). As we pointed out in our brief in *Bank of Coushatta*, such directives do not involve requirements on a bank holding company of the sort at issue here. See 91-24 Br. in Opp. 12 n.8. Here, the Board is not directing MCorp to increase its own capital; rather, the Board seeks, by way of a cease-and-desist proceeding, to require MCorp to increase the capital of a *subsidiary* bank.

MCorp's argument is entirely misconceived. One might debate the value of legislative committee reports and floor statements in determining the meaning of legislation they address. Compare, *e.g.*, *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476, 2484-2485 n.4 (1991), with *id.* at 2488-2490 (Scalia, J. concurring). But certainly, the testimony of committee *witnesses* on the wisdom of pending legislative *proposals* has no value in determining the meaning of *existing* legislation. The legislative testimony that MCorp submits is useless in interpreting the statutes involved here.[3]

3. *The "material misstatement of fact."* MCorp also errs in contending that the government made a "material misstatement of fact" in a footnote of the government's reply brief. MCorp Supp. Br. 7-10. MCorp argued in its opening brief that the Board had issued temporary cease-and-orders that "compel the transfer of assets of MCorp's estate." MCorp Br. 15. We responded in a footnote:

> [T]he relevant provisions of the Board's October 1988 temporary order, which sought MCorp's compliance with the source of strength policy, were suspended by the Board shortly after the order was issued, pending MCorp's negotiations with the FDIC. J.A. 184-185. The Board has not re-

[3] MCorp also reargues the wisdom of pending legislation that would impose source of strength requirements. See MCorp Br. 4-7. These proposals, which similarly provide no helpful guidance, were previously addressed in MCorp's opening brief. MCorp Br. 37-38. They are not new matters at all.

> instated those provisions and they have no effect on MCorp.

U.S. Reply Br. 5-6 n.6; see also *id.* at 10 n.12. That statement is entirely accurate. Although the Board issued three temporary orders, J.A. 65-67, 68-70, 84-86, only *one* could be read to "compel the transfer of assets of MCorp's estate." MCorp Br. 15. The first temporary order directed that MCorp shall not "pay any corporate dividends" without prior Board approval. J.A. 66. The second temporary order directed that MCorp shall not enter into extraordinary transactions that have the effect of "dissipating" certain assets. J.A. 69-70. Those orders plainly did not "compel the transfer of assets." MCorp Br. 15.[4]

The only temporary order that even arguably had the effect of compelling the tranfer of assets was issued on October 26, 1988, and provided in relevant part:

> MCorp shall (a) take such actions as are necessary to use all of its assets to provide capital support to its Subsidiary Banks in need of capital, and (b) within 15 days of the effective date of this Temporary Order, report to the Board of Governors on the identity of those Subsidiary Banks into which capital injections will be made by MCorp and the amount of capital to be injected in each such bank.

J.A. 85. Four days later, however, the Board made clear that the order did "not require MCorp to take

[4] Indeed, MCorp's bankruptcy petition may have mooted those orders to the extent that MCorp, as a debtor in possession, is prohibited from paying dividends or dissipating assets. In any event, the Board has made no attempt to enforce those orders, and they are subject to judicial review in an independent district court proceeding. See note 6, *infra*.

any affirmative action with respect to MCorp assets prior to the submission of the report called for by the Order." J.A. 184. On November 7, 1988, the Board deferred the time for submitting the report "until five days following notice to MCorp by the Board." J.A. 184. The Board has *not* given such notice *nor* has it attempted to enforce the October 26 order.[5] Hence, our footnote responding to MCorp's argument is accurate. The only temporary order that even arguably "compel[s] the transfer of assets," MCorp Br. 15, has "no effect on MCorp." U.S. Reply Br. 5-6 n.6.

More importantly, the temporary orders that MCorp discusses are not relevant to the resolution of this case. The fundamental issue here is whether the Board may continue its administrative proceedings to determine *whether* MCorp should be subject to a *permanent* cease-and-desist order. That is what the Board seeks, see U.S. Br. 16-18; J.A. 13-14; that is what the FISA allows, see 12 U.S.C. 1818(b), (h) and (i); and that is what the district court injunction currently prevents, see J.A. 222. MCorp's assertion that the district court's injunction here should remain in place to protect MCorp from the temporary orders, MCorp Supp. Br. 10, is simply another red herring.[6]

[5] Contrary to MCorp's assertion, the Board's Second Amended Notice of Charges, issued in May 1989, did not change the suspended status of the temporary order. That Notice expressly states that it does not affect the "status" of the previously issued temporary orders. J.A. 194.

[6] As we discussed in our opening brief, Congress has provided MCorp with an avenue for immediate judicial relief from temporary orders. See U.S. Br. 5, 19-20. The appropriate district court may issue an injunction "setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order" pending the completion of the administrative proceedings for a permanent order. See 12 U.S.C. 1818(c)(2). Indeed, as

Respectfully submitted.

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MCorp acknowledges, it has filed such an action in the U.S. District Court for the Northern District of Texas, and that court has stayed its proceedings pending the outcome of this case. MCorp Br. 3; J.A. 174. Thus, if this Court dissolves the injunction issued in this case, MCorp can return to the U.S. District Court for the Northern District of Texas—its original forum of choice—for any further relief that may be appropriate with respect to the temporary orders. Notably, while MCorp argues that the temporary orders have "continuing effectiveness," MCorp Supp. Br. 9, MCorp fails to identify any such "effect." See note 4, *supra*. Thus, MCorp should return to the United States District Court for the Northern District of Texas, which currently has jurisdiction over the matter, to determine the continuing practical effect (if any) of those orders and the course (if necessary) of any future judicial proceedings.

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